U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 18, 1998

Case No.: 1997-INA-0058

In the Matter of:

RANCHO AUTO BODY
Employer

On Behalf Of:

MARTIN RIVAS-REYES,
Alien

Certifying Officer Rebecca Marsh Day, Region IX
Appearance: Susan M. Jeannette, Esq., North County Legalization Services
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 27, 1994, Rancho Auto Body ("Employer") filed an application for labor certification to enable Martin Rivas-Reyes ("Alien") to fill the position of Painter/Bodyman (AF 75). The job duties for the position are:

> Auto body man to repair and paint upscale vehicles, new, used, and restorations along with classics and antiques. Able to direct the workers in the methods of sanding and redoing the exterior of the vehicle. Able to mix certain lacquers and paints when matching the previous exterior color. Special skill required as the cars are Mercedes, Porches, Lamborginni's and Ferrari's.

The requirements for the job are 4 years of high school and 2 years in the job offered or 2 years in the related occupation of Painter/auto body man. As an other special requirement, it was stated "Must have a BRONZE LEVEL TWO TECHNICIAN RATING." (Emphasis in original). The position was classified by the CO as Supervise, Automobile Body Repair with a DOT occupational code of 807.137-010.

On April 15, 1996, the CO issued a Notice of Findings proposing to deny certification under 20 C.F.R. § 656.3 on the grounds that no bona fide job exists to which U.S. workers can be referred. (AF 72). In support of this finding, the CO notes that the documentation submitted with the application indicates that there is one employee which the alien will supervise. (The job in question here is for a supervisory position, with DOT occupational code 807.137-010). The CO further notes that the Alien has been working for the Employer since 1989, but employer has not reported any wages paid. Therefore, the Employer was directed to demonstrate that he is in compliance with federal and state reporting requirements and must furnish all W-2 forms for the alien and the employee he will supervise for the three years prior to the filing of this application.

The CO also proposed to deny on the grounds that the Employer has not demonstrated the ability to pay wages for the position being offered, in violation of 20 C.F.R. § 656.20(c)(1) and (c)(3). The CO directed the Employer to submit evidence to show that Employer's income is sufficient to pay the offered wages.

On April 30, 1996, Employer rebutted that he has been paying wages and states that all documentation requested by the CO is attached to his rebuttal (AF 71). It is noted that the actual documentation identified in the Employer's rebuttal does not appear to be in the record.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On May 17, 1996 the CO issued a Supplemental NOF (AF 50-52) again proposing denial on the grounds that no bona fide job opening exists to which U.S. workers may be referred. There, the CO says there is another labor certification application for this employer for a Fernando Maldonado-Garcia which was certified on January 23, 1996. As a part of the Garcia case, the CO states that this alien, Martin Rivas-Reyes, signed a statement that Spanish was required as his supervisor (Reyes) only speaks Spanish. The CO then notes that Employer submitted, as a part of the April 30, 1996, rebuttal in this case, a W-2 form for an Arturo Gonzales Garcia that Reyes purportedly supervises with the same address as Fernando Maldonado-Garcia. However, the CO correctly notes that there is no Spanish requirement in this case. Therefore, the CO required the Employer to advise the connection between the two Garcias, and asked who will supervise Fernando Maldonado-Garcia.

On June 6, 1996, Employer rebuts the Supplemental NOF, stating that the two Garcias, Fernando Maldonado Garcia and Arturo Gonzales Garcia, are one and the same person and that the alien, Martin Rivas-Reyes, is his supervisor. Employer states that,

> It was not until after we had begun our sponsorship of Martin Rivas Reyes, that we found out that Arturo Gonzalez Garcia was Fernando Maldonado-Garcia, and that he was using an alias. We were told this by Fernando (Arturo) when he asked us if we would sponsor him, too. (AF 53-54).

On July 16, 1996, the CO issued a Final Determination denying certification under 20 C.F.R. § 656.3 on the grounds that Employer has not demonstrated that a bona fide job opening exists to which U.S. workers may be referred. We note that the Final Determination does not refer to the issue of the Employer's ability to pay the offered wages (which was raised in the original NOF). Therefore, we infer that the CO was satisfied with Employer's documentation as to that issue.

Discussion

The sole issue for determination is whether the Employer has rebutted the CO's finding that Employer has not demonstrated that a bona fide job opening exists to which U.S. workers may be referred. We agree with the CO's finding that no bona fide job opening exists **to which U.S. workers may be referred.** The key phrase in this finding is "**to which U.S. workers may be referred.**"

We have consistently required Employers to act in good faith in labor certification applications. Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.,* 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

The entire factual scenario in this case reeks of a lack of good faith, including participation by this alien, Martin Rivas-Reyes, in a scheme to get Arturo Gonzales Garcia, who was working illegally using false documents and using the alias of Fernando Maldonado-Garcia[2], certified, by claiming to only speak Spanish (Reyes was allegedly his supervisor), in order to justify the Spanish language requirement in that case. In spite of this assertion by the alien, Reyes, (in the Garcia case), Spanish has not been required in the present case.

As noted by the CO in the final determination,

> By the mere fact that both aliens received their mail at the supervisor's residence, that this case file has no Spanish language requirement, although the alien stated when he was signatory on the other case file that he only speaks Spanish, that the owner, the signatory on this case file, has admitted that he did not state the **true** minimum requirements for this application, and that both the owner (the signatory on this case) and this alien who was signatory on the case file for Fernando Maldonado Garcia failed to state that Fernando had been working under the alias of Arturo Gonzalez Garcia, there is a lack of documentation that a bona fide job opening exists to which U.S. workers may be referred. (AF 67, item 9).

Under the totality of these circumstances it is clear that this Employer never intended to permit U.S. workers to have an opportunity to fill this position. We wonder what the employer would have done if a qualified U.S. worker applied who spoke no Spanish, when he would be expected to supervise an employee (Arturo Gonzales Garcia) who spoke only Spanish. There is no bona fide job opportunity here **to which U.S. workers could be referred**.

Accordingly, the CO's denial of labor certification will be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

ALJ Lawson, DISSENTING:

[2] It is assumed that the Certifying Officer is familiar with and has or will comply with 20 C.F.R. § 656.30(d) and 20 C.F.R. § 656.31.

Employer's appeal argues on brief[3] that the denial should be reversed and the alien certified on the grounds that the CO failed to discuss or address employer's rebuttal evidence, citing *Dr. Mary Zumot*, 89-INA-35 (1991) and *Barbara Harris*, 88-INA-392 (1989) and that the CO raised issues and cited evidence for the first time in the Final Determination. Examination of the record sustains the employer's position as to the second of these contentions.

In response to Corrective Action Required by the CO's April 15, 1996 original Notice of Findings, Employer's rebuttal on the issues of "NO BONA FIDE JOB OPENING" and "ABILITY TO PAY THE PREVAILING WAGE FOR THE POSITION OF SUPERVISOR, AUTOMOBILE BODY REPAIR" consisted of 1) all paycheck stubs for the alien, 2) tax returns of the alien, 3) W-2's for the alien, 4) corporate taxes, 5) 941's, 6) D3DP's, 7) DE6's and 8) Tax Documents for Arturo Gonzalez Garcia. (AF 31-33) As reflected in employer's January 11, 1997 Statement of Position before BALCA:

> This documentation filled an entire 8 ½ x 11 paper box, which usually holds 5,000 sheets of paper. This documentation was state and federal wage payments of workers ranging as far back as 1990.

These documents were neither addressed nor discussed in the Final Determination in the context in which they were requested, notwithstanding they responded to the CO's original Notice of Findings. (AF 42-43) Thus, it seems that the original notice was satisfied obviating the need for discussion of the issue in light of those documents. However, the second NOF noted discrepancies in the Employer's new evidence, including differing Garcia names with the same address and the fact that the Spanish language is not required in this case, whereas the alien stated in the Garcia application that Spanish is required as he only speaks Spanish. The second NOF specified:

> Corrective Action Required:
>
> What is the connection between Fernando Maldonado-Garcia and Arturo Gonzales (z) Garcia? Who will be the supervisor of Fernando Maldonado-Garcia? (AF 36)

Employer's response, if credited, does explain the differing Garcia names, and if credited does answer the question of who the alien would be supervising. It also, if credited, answers the unasked question why Spanish was not listed as a requirement for the job. There is no evidence in the record to contradict these assertions by the employer. The CO's denial on the grounds that there is no employee to be supervised cannot be affirmed.

The Final Determination specifies 11 reasons for denial including:

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[3] Although the brief was untimely, these issues are within the scope of the Board's review and were raised in the Employer's January 11, 1997 Statement of Position and August 16, 1996 Request for Reconsideration and BALCA Review.

"1. The employer has failed to document that a bona fide job opening exists to which U.S. workers may be referred."

And then focuses in reasons 2-10 upon the relationship of a companion application in the case file of another alien sponsored by the same Employer, without offering opportunity for rebuttal, before concluding

"11. This labor certification is denied per 20 CFR 656.3." (AF 10-12)

The appeal justifiably complains that the last cited section is merely definitional and offers no basis for denial, and that significant weight was given, notwithstanding the disavowal, to the alias matter in:

"10. Although the failure to note the alias in the prior labor certification case file is not the basis for denial in this file, it does support the finding that there is no bona fide job opening since there is no employee to be supervised and this case file is for a supervisory auto body repairer."

Thus, this case was decided on an issue which was raised in neither the original nor the supplemental NOF, namely "that there is no bona fide job opening since there is no employee to be supervised and this case file is for a supervisory auto body repairer."[4]

Transparently the alias finding, together with the interrelationship of the entire approved companion file, was paramount with the CO, but opportunity for further rebuttal was not offered. Also, as employer argues, the CO's prejudicial intermingling of facts and cases is evidenced by the CO forwarding to BALCA the certified companion file instead of the instant denied file.

The majority, however, has gone beyond the issues raised on appeal and beyond the finding in the FD "that there is no bona fide job opening since there is no employee to be supervised and this case file is for a supervisory auto body repairer", which the majority does not attempt to sustain. Instead, the majority predicates denial of certification on "lack of good faith" and a "scheme... illegally using false documents" notwithstanding the FD disavowed reliance on the alias matter, and suggests that the CO initiate a fraud investigation. The majority has done so without acknowledging employer's request for reconsideration (AF 2-8) that addresses issues first raised in the FD and upon which the majority has predicated its opinion on review of the record *de novo*. Due process has been violated both in the FD and the majority opinion. The FD should be reversed and remanded for consideration of response to new issues raised therein.

This application ought not in any event be denied by the Board without consideration, *en banc*, of the proper scope and standards of review.

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[4] Raising an issue for the first time in the FD deprives the employer of the opportunity to rebut or cure, *Downey Orthopedic Medical Group*, 87-INA-674 (Mar.14, 1988) (*en banc*), denies due process, *Counterpoint Development Co.*, 89-INA-153 (Mar. 12, 1990)(just as here, FD was confusing and disingenuous, and failed to address issue raised in NOF); and violates § 656.25(c)(20) *Tarmac Roadstone (USA), Inc*., 87-INA-701 (Jan. 4, 1989).

James W. Lawson
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.